

IN THE UNITED STATES BANKRUPTCY COURT **FILED**

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Waycross Division

Samuel L. Kay, Clerk
United States Bankruptcy Court
Brunswick, Georgia
By cking at 2:41 pm, Mar 29, 2012

IN RE:)	Chapter 11 Case
)	Number <u>09-51227</u>
DIVERSIFIED TRAFFIC SERVICES, INC.)	
)	
Debtor)	
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DIVERSIFIED TRAFFIC SERVICES, INC.)	
)	
Moving Debtor)	
)	
vs.)	
)	
BOARD OF COMMISSIONERS OF PIERCE)	
COUNTY, GEORGIA)	
)	
and)	
)	
PRESIDENTIAL FINANCIAL CORPORATION)	
)	
Objecting Creditors)	

ORDER SUSTAINING OBJECTION OF PIERCE COUNTY TO DEBTOR'S
MODIFICATION OF CHAPTER 11 PLAN AFTER CONFIRMATION

The matter before me is a Modification to a Plan After Confirmation ("Proposed Plan Modification") filed by the debtor, Diversified Traffic Services, Inc. ("Diversified"). (Mot. to Modify Ch. 11 Plan After Confirmation, Aug. 3, 2011, Case Dkt. No. 283; First Addendum, Aug. 26, 2011, Case Dkt. No. 287;

Amendment to First Addendum, Aug. 31, 2011, Case Dkt. No. 292.)¹ Presidential Financial Corporation ("Presidential") filed an objection to the Proposed Plan Modification on August 29, 2011. (Case Dkt. No. 290.) The Board of Commissioners of Pierce County, Georgia ("Pierce County"), filed an objection to the Proposed Plan Modification on September 17, 2011. (Case Dkt. No. 298.)

At hearing on September 22, 2011, I sustained Pierce County's objection and afforded Diversified thirty days to file a new plan modification. I deferred ruling on Presidential's objection until the Pierce County objection was resolved by further modification. I received correspondence from Diversified dated October 19, 2011, stating that Diversified would not file a new plan modification and asking that I rule on whether the Proposed Plan Modification would be allowed as filed. (Case Dkt. No. 304.) I find that Diversified's treatment of Pierce County in the Proposed Plan Modification is not permitted because Pierce County does not hold an allowed claim in Diversified's bankruptcy. Accordingly, Pierce County's objection is sustained for the reasons that follow.

¹ References to the chapter 11 case docket appear as "Case Dkt. No."

FINDINGS OF FACT

In 2007, Diversified entered into a line of credit agreement with Presidential, and Diversified assigned its accounts receivable to Presidential. (Mem. Op. and Order, May 24, 2010, Case Dkt. No. 119 at 3.) Pursuant to the assignment, Presidential would receive all monies due to Diversified under its service contracts. (Id.) On September 10, 2009, Diversified was awarded a contract to perform highway striping services for Pierce County ("September 10 Contract"). (A.P. Dkt. No. 41 at 4.)²

On November 13, 2009, Diversified filed its chapter 11 bankruptcy petition. (Case Dkt. No. 1.) In its bankruptcy schedules, Diversified listed Presidential as a secured creditor holding a claim in an unknown amount. (Case Dkt. No. 13 at 10.) Pierce County was not listed in the schedules.³ On November 20, 2009, notice was issued stating that the deadline for filing a proof of claim in Diversified's bankruptcy case was March 18, 2010, for non-governmental creditors and May 12, 2010, for governmental units. (Case Dkt. No. 8 at 1.) Neither Presidential nor Pierce County filed a proof of claim.

Shortly thereafter, a dispute arose as to whether Diversified's assignment of accounts receivable to Presidential

² References to adversary proceeding number 10-05022 appear as "A.P. Dkt. No."

³ Jesse Lewis, Pierce County Tax Commissioner, was listed as a creditor holding an unsecured priority claim for ad valorem taxes of \$1,426. (Case Dkt. No. 12 at 16.) However, the Tax Commissioner is a different entity than the Board of Commissioners, which entered into the pre-petition contract with Diversified.

remained effective postpetition. (Mot. to Reject Security Agreement, Dec. 10, 2009, Case Dkt. No. 18.) Before the dispute was resolved, Diversified asked Pierce County to pay directly to Diversified the monies due under the September 10 Contract. (A.P. Dkt. No. 41 at 4.) On February 10, 2010, Pierce County paid Diversified \$42,355.30 for services performed under the contract. (Id.)

By order entered on May 24, 2010, I determined that the assignment of existing pre-petition accounts receivable continued postpetition. (Case Dkt. No. 119.) Therefore, Presidential had an enforceable security interest in the \$42,355.30 that Pierce County had paid to Diversified. (See Id.) After Diversified refused to pay the money to Presidential, Presidential filed an adversary complaint on November 15, 2010, to recover the money. (Case Dkt. No. 214.) In its answer, Pierce County asserted a cross-claim against Diversified seeking recovery from Diversified of any award against Pierce County to Presidential. (A.P. Dkt. No. 8 at 8-9.) On June 8, 2011, I determined that Diversified and Pierce County were jointly and severally liable to Presidential for \$42,355.30. (A.P. Dkt. No. 41.) In July 2011, Pierce County paid \$42,355.30 to Presidential. (Mot. to Modify Ch. 11 Plan After Confirmation, Case Dkt. No. 283.) On September 9, 2011, judgment was entered in the adversary proceeding on Pierce

County's cross-claim ordering Diversified to pay Pierce County \$42,355.30. (A.P. Dkt. No. 52.)

Diversified's chapter 11 plan was confirmed on April 6, 2011 (Case Dkt. No. 272). The plan provides for payment of Presidential's secured debt. (Case Dkt. No. 270.) The plan does not address any debt owed to Pierce County.⁴ The plan provides that Diversified may modify the plan in accordance with Bankruptcy Code § 1127(b). (Case Dkt. No. 243 at 9.)

The Proposed Plan Modification reduces the monthly payments to Presidential from \$2,700 to \$2,119.05 to account for the \$42,355.30 payment Presidential received from Pierce County. (Case Dkt. No. 283 at 1-2.) The Proposed Plan Modification also states:

Pursuant to the judgment entered in favor of Pierce County August 24, 2011⁵, [Diversified] proposes to add the claim of Pierce County in the amount of \$42,355.30 as an unsecured claim to Class 6. The same shall be treated in a manner equal to all other Class 6 unsecured claims. Pierce County shall receive 10% of its claim over a period of ten (10) years, and all other unsecured claims shall receive 10% of allowed claim amounts, as provided in the confirmed plan.

(Case Dkt. No. 292 at 1.)

⁴ The plan provided for payment to the Pierce County Tax Commissioner but not to the Board of Commissioners. (Case Dkt. No. 243 at 19-20.)

⁵ As Pierce County noted in its objection, Diversified incorrectly stated that the judgment was entered on August 24, 2011. (Case Dkt. No. 298 at 2.) The judgment was in fact entered on September 9, 2011. (A.P. Dkt. No. 52.)

CONCLUSIONS OF LAW

A chapter 11 plan may be modified after confirmation only if it is modified before substantial consummation and if circumstances warrant such modification. 11 U.S.C. § 1127(b). In addition, any modified plan must meet the requirements of §§ 1122 and 1123 and be confirmed by the court pursuant to § 1129. Id. Notwithstanding the requirements of § 1127, an entity must hold an allowed claim before it can be provided for in a debtor's plan. The concept of an "allowed claim" lies at the heart of the bankruptcy process, for only those who possess allowed claims are entitled to distribution from the bankruptcy estate. In re Insilico Technologies, 480 F.3d 212, 216 (3d Cir. 2007) (citing In re Johns, 37 F.3d 1021, 1023 n.1 (3d Cir. 1994)). Diversified proposes to modify its plan to "add the claim of Pierce County." However, Pierce County does not hold an allowed claim. Therefore, it cannot receive distributions through Diversified's chapter 11 plan.

A debtor's chapter 11 plan is binding on "creditors." 11 U.S.C. § 1141(a). The Bankruptcy Code defines a "creditor" as "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). If an entity does not hold a claim that arose pre-petition, then there is no statutory basis to classify and treat that entity under a plan of reorganization. See Piper

Aircraft Corp. v. Calabro (In re Piper Aircraft Corp.), 169 B.R. 766, 779 (Bankr. S.D. Fla. 1994).

The Bankruptcy Code defines a "claim" as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A). A "right to payment" is "nothing more nor less than an enforceable obligation." Cohen v. de la Cruz, 523 U.S. 213, 218 (1998) (quoting Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 558 (1990)).

A claim must be asserted before it can be allowed to participate in the debtor's bankruptcy. See Fed. R. Bankr. P. 3002(a), In re Meadowbrook Estates, 246 B.R. 898, 903 (Bankr. E.D. Cal. 2000). In a chapter 11 case, an entity may assert its claim by filing a proof of claim, or a proof of claim is "deemed filed" if the debtor lists the debt in its bankruptcy schedules and does not list it as disputed, contingent, or unliquidated. 11 U.S.C. §§ 501, 1111(a).

Not every asserted claim is allowed to participate in the debtor's bankruptcy and may be provided for in the debtor's plan. See 11 U.S.C. § 502(b). Each asserted claim must go through the claims allowance process, which controls whether an entity holds a claim that may be paid by the bankruptcy estate. See Fed. R.

Bankr. P. 3021 (distribution shall be made to creditors whose claims have been allowed).

A claim is "deemed allowed" unless a party in interest objects to the claim. 11 U.S.C. § 502(a). When there is an objection, the court must allow the claim in the "amount of such claim . . . as of the date of the filing of the petition." 11 U.S.C. § 502(b). Therefore, an entity holds an allowed claim and is a creditor in a debtor's bankruptcy if: 1) the entity has a right to payment, and 2) that right to payment arose pre-petition. See In re Chateaugay, 53 F.3d 478, 497 (2d Cir. 1995); see also In re Hall, 454 B.R. 230, 234 (Bankr. N.D. Ga. 2011) (stating that a bankruptcy claim exists when there is an enforceable obligation at the time of the debtor's bankruptcy filing).⁶ An entity holding a purported claim that arose postpetition cannot be a creditor and cannot by definition have an allowed claim as of the petition date. See In re Ockerlund Const. Co., 308 B.R. 325, 331 (Bankr. N.D. Ill. 2004).

Here, Pierce County is not a creditor because it does not have an allowed claim in Diversified's bankruptcy. Pierce County

⁶ There are several exceptions to the general rule that an entity's right to payment must arise pre-petition to participate in the debtor's bankruptcy. The following provisions, none of which are applicable here, allow postpetition claims to be treated as though they arose pre-petition: § 502(e)(2) (guarantor's reimbursement or contribution claim), § 502(f) (claims arising in involuntary cases before the order of relief), § 502(g)(1) (claims arising from the rejection of an executory contract or unexpired lease), § 502(g)(2) (damages related to the rejection of swap agreements), § 502(h) (claims arising from the recovery of property under §§ 522, 550, and 533), § 502(i) (taxes), § 503 (administrative expenses).

currently has a right to payment as a result of the judgment entered on September 9, 2011. However, that right to payment did not exist before Diversified filed this case on November 13, 2009.

Diversified did not list any debt owed to Pierce County in its bankruptcy schedules. No proof of claim was filed asserting that Pierce County had a claim in Diversified's bankruptcy. In fact, it was impossible for anyone to assert a claim for Pierce County. When Diversified filed its bankruptcy petition and schedules, Diversified did not owe any money to Pierce County. Obviously, it could not list any debt owed to Pierce County in its bankruptcy schedules. Moreover, the deadline for filing proofs of claim for governmental units was May 12, 2010. No one could have filed a proof of claim by that date for a debt that did not exist until September 9, 2011. Diversified makes no argument that the debt owed to Pierce County arose pre-petition or should be treated as though it did. Accordingly, Pierce County is not a creditor that can be bound by Diversified's chapter 11 plan.

Furthermore, Pierce County's ability to enforce the judgment is not affected by Diversified's bankruptcy. The order confirming Diversified's chapter 11 plan was entered on April 6, 2011, and states that "[t]he automatic stay of 11 U.S.C. § 362 is lifted." (Case Dkt. No. 272 at 1.) Therefore, when the judgment was

entered on September 9, 2011, the automatic stay did not prevent Pierce County from enforcing it.

In addition, the debt Diversified owes to Pierce County was not affected by the bankruptcy discharge. Pursuant to § 1141(d), the confirmation of a chapter 11 plan "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A). The debt owed to Pierce County, evidenced by the judgment, did not arise before Diversified's chapter 11 plan was confirmed and was not discharged. Pierce County is, and has always been, free to pursue its state court remedies to collect the judgment.

ORDER

Accordingly, Pierce County's Objection to Diversified's Motion to Modify Chapter 11 Plan After Confirmation is **ORDERED SUSTAINED**; and

IT IS FURTHER ORDERED that the clerk is directed to set a hearing on the objection of Presidential Financial Corporation.



JOHN S. DALIS
United States Bankruptcy Judge

Dated at Brunswick, Georgia,
this 29th day of March, 2012.